DEWEY & LEBOEUF

Dewey & LeBoeuf LLP
1101 New York Avenue N.W.
Suite 1100
Washington, D.C. 20005-4213

tel +1 202 346 8077
fax +1 202 956 3337
dturetsky@dl.com

June 4, 2008

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket No. 07-42; MB Docket No. 07-29
EX PARTE

Dear Ms. Dortch:

On June 3, 2008, Mark Cuban, co-founder of HDNet LLC, and the undersigned met separately with (i) Commissioner Adelstein and Rudy Brioché; (ii) Commissioner Copps, Rick Chessen, and Ibert Schultz, (iii) Maureen McLaughlin, Steven Broeckaert, David Konczal, Mary Beth Murphy, Betsy McIntyre, and Tracy Waldon, and (iv) Amy Blankenship, to discuss the interest of HDNet LLC in these proceedings. Ms. Kathleen Wallman of Kathleen Wallman, LLC attended the meetings with Commissioner Adelstein and Ms. Blankenship. Mr. Brett A. Snyder of Dewey & LeBoeuf LLP attended the meetings with Commissioner Adelstein, Commissioner Copps, and Ms. McLaughlin, *et al*. Ms. J. Porter Wiseman of Dewey & LeBoeuf LLP attended the meeting with Ms. McLaughlin, *et al*.

In each of the meetings, HDNet presented its positions previously described in its November 20, 2007 *ex parte* submission. HDNet emphasized the following points:

- Independent programming is disappearing. Few innovative entrepreneurial programmers like HDNet remain—neither affiliated with an MVPD nor a large programmer selling several networks.

- Most independent programmers are reluctant to speak out about discrimination.

- An independent programmer's means to expose potential new viewers to its programming and generate demand for carriage on a platform on which it has not been carried has been thwarted. After HDNet bought advertising on Discovery HD Theater, an HD network carried by more cable platforms, in an attempt to use market means to expand carriage, Discovery stopped running the advertising and made a refund well before the advertising contract expired. Discovery did so after it was told by "at least one" cable distributor affiliate that running those advertisements could prejudice Discovery's ability to secure carriage of more Discovery affiliates:

  "Indeed, at least one of Discovery's cable distributor affiliates that is wholly unrelated to Discovery pointed out the irony of Discovery running such advertisements while engaged in carriage negotiations for its own HD programming, noting that Discovery was making it more difficult for itself by running ads encouraging viewers to request other HD-oriented networks."[1]

- HDNet explained the irreparable harm that occurs if an MVPD can implement adverse discriminatory changes affecting the programmer—such as a tier change—prior to decision on the complaint. HDNet referred to its November 20, 2007 *ex parte* submission in MB Docket No. 07-42 for a description.

- HDNet said that the right to be free of discrimination is no right at all without an effective way to enforce it. This lack of enforcement complicates private negotiations because there are no constraints.

- In the rulemaking in MB Docket No. 07-42, the FCC can streamline the handling of carriage complaints consistent with the attachment to this letter.

- Wholesale bundling takes up channel space that would otherwise be available to independent programmers preferred by viewers. This often involves tying "must have" channels to channels with small or non-existent audiences. Capacity constraints for HDTV are exacerbated not only by bundling, but by channels that merely "upconvert" from standard definition, thereby reducing the incentive to produce true HD programming.

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[1] The full text of Discovery's letter is publicly available and on file at the FCC: Letter from Tara M. Corvo, Counsel to Discovery Communications, LLC, to Marlene Dortch, Secretary, FCC, at 2, *Application of News Corp. & The DIRECTV Grp.*, MB Docket No. 07-18 (Nov. 20, 2007).

Respectfully submitted,

/s/ David S. Turetsky

David S. Turetsky
Counsel to HDNet LLC

Attachment

cc: Rudy Brioché, FCC (via e-mail)
Rick Chessen, FCC (via e-mail)
Ibert Schultz, FCC (via e-mail)
Maureen McLaughlin, FCC (via e-mail)
Steven Broeckaert, FCC (via e-mail)
David Konczal, FCC (via e-mail)
Mary Beth Murphy, FCC (via e-mail)
Betsy McIntyre, FCC (via e-mail)
Tracy Waldon, FCC (via e-mail)
Amy Blankenship (via e-mail)

1. **Establishment of a Shot Clock**

Once a Complaint, Answer, and Reply are filed, there is neither a timeline for when the FCC will respond to the complaint nor when final resolution will take place. Proposed change to Section 76.1302:

(h) *Deadlines for Commission Findings and Decisions*

(1) The Commission shall make a determination as to whether a complainant has made out a prima facie case under this section within 30 days of the filing of a complainant's reply to a defendant's answer to a complaint, or the date on which such reply would be due if none is filed.

(2) The Commission shall issue a final order resolving a complaint found to have made out a prima facie case no later than 6 months from the date of the initial filing of the complaint.

2. **Definition of Prima Facie Case**

Currently, there is no definition in the rules of what constitutes a prima facie case. Consequently, defendants argue their own versions of the standard to try to get independent programmers' complaints dismissed. This lack of clarity is a problem for independent programmers who are in litigation before the Commission, and for programmers who are contemplating litigation to vindicate their rights. Proposed change to Section 76.1302:

(c) *Contents of Complaint* .... (5) "Prima facie case" means that the complainant shall put before the Commission evidence of the elements of the discrimination offense, supported as appropriate by documents and testimony by declaration or affidavit, that, if subsequently found to be true by a finder of fact, would be sufficient to establish a violation under this section.

3. **Prohibition against retaliation**

It is important that the Commission make it clear that MVPD discrimination in the form of retaliation against independent programmers for their lawful assertion of their rights will not be tolerated, whether before, during or after carriage. Proposed change to Section 76.1301:

(c) *Discrimination.* [Add the following at the end of subsection c] A multichannel video programming distributor's refusal to deal, or refusal to negotiate in good faith, with a non-affiliated video programming provider because of the latter's assertion of rights or remedies under this Subpart shall constitute discrimination.

4. **Stay During Litigation**

Independent programmers who have carriage and are offering their programming to cable or DBS subscribers may suffer discrimination in the terms or conditions of carriage. For example, after the network has made substantial investments and commitments in programming, and entered into advertising and other arrangements, the MVPD may seek to favor affiliated programming by "re-tiering" the independent programmer to an expensive or unpopular tier with reduced viewership and revenue during or after an initial term of the carriage agreement. Proposed change to Section 76.1302:

Insert before existing subsection (g) and renumber accordingly:

(g) *Stay during litigation*: Upon a complainant's filing of a complaint alleging discrimination with respect to a change in the terms or conditions of carriage, any such change shall be null and void and the terms and conditions of carriage shall revert to *status quo ante* for the duration of the pendency of the Commission's decision upon such complaint.